

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER
ADMINISTRATIVE REVIEW AND ACTION BY THE
CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,)
Complainant)
)
v.) 8 U.S.C. 1324a Proceeding
) Case No. 89100063
G.L.C. RESTAURANT, INC.)
d/b/a CAPRICCIO RESTAURANT)
Respondent)
_____)

ACTION BY THE CHIEF ADMINISTRATIVE
HEARING OFFICER REMANDING THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND ORDER

On February 2, 1989, the United States of America, by and through its agency, the Immigration and Naturalization Service, (hereinafter complainant) filed a complaint against G.L.C. Restaurant, Inc., (hereinafter respondent).

The complaint alleged unlawful employment and employment verification violations by respondent under Sections 274A(a)(1)(A), (a)(2) and (a)(1)(B) of the Immigration and Nationality Act, codified at 8 U.S.C. §§1324a(a)(1)(A), (a)(2) and (a)(1)(B); and requested civil money penalties totaling \$1,500.00.

On February 9, 1989, I assigned the Honorable Nancy M. Sherman, Administrative Law Judge (hereinafter ALJ) to this case. On January 23, 1990, complainant filed a motion to dismiss the complaint and cancel the hearing date. By order dated March 15, 1990, the ALJ dismissed the complaint with prejudice and canceled the hearing date.

On May 14, 1990, the respondent filed an application for attorney's fees and other expenses, entitled, "Request for Attorney Fees Under

The Equal Access to Justice Act", in the amount of \$9,124.90. On June 19, 1990, the complainant filed a motion to deny respondent's Equal Access to Justice Act claim (hereinafter EAJA), 5 U.S.C. §504. On July 18, 1990, respondent filed a reply to the complainant's motion to deny, seeking to increase the amount for attorney's fees from \$9,124.90 to \$12,087.00 (reflecting an increase in the attorney's hourly rate from \$75.00 to \$100.00). On August 3, 1990, the complainant filed a "Motion to Strike Respondent's Request to Amend Application for Attorney's Fees". On August 10, 1990, the ALJ issued an order to show cause why respondent's request for attorney's fees should not be dismissed. The respondent filed a response on September 8, 1990, which again increased the amount of fees and expenses to \$14,120.00, based upon additional activities regarding the reply to the order to show cause.

On November 20, 1990, the ALJ issued a Decision and Order which dismissed, for lack of jurisdiction, the respondent's application for attorney's fees under EAJA. The ALJ based this decision upon a conclusion that the respondent's application for attorney's fees was untimely filed, that is, more than 30 days after the date of the final disposition in the adversary adjudication. See 5 U.S.C. §504(a)(2). The ALJ fixed the final disposition at a date no later than the time allowed for the filing period for the Chief Administrative Hearing Officer to review the ALJ's order, i.e., within five days of the date of the order. *ALJ's Decision and Order* at 3.

On December 3, 1990, the respondent filed with this office, a timely request for administrative review of the denial of the EAJA application, pursuant to 28 C.F.R. §68.53(a).¹ The complainant responded by filing a reply, received by this office on December 12, 1990.

On December 18, 1990, I issued an order affirming the ALJ's November 20, 1990, decision and order. On January 4, 1991, the respondent's attorney filed a petition for review of the ALJ's order and my affirmation of that order with the United States Court of Appeals for the Eleventh Circuit.

Subsequent to my affirmation of December 18, 1990, the United States Court of Appeals for the Ninth Circuit issued an order in A-Plus Roofing v. U.S. Immigration and Naturalization Service, No. 90-70547 (9th Cir. March 28, 1991). This case held that an ALJ's order becomes

¹ Rules of Practice and Procedure for Administrative Hearings 56 F.R. 50049 (Oct. 3, 1991) (to be codified at 28 C.F.R. Part 68) (hereinafter cited as 28 C.F.R. §68).

the final agency order 30 days after it is filed, pursuant to 8 U.S.C. § 1324a(e)(7) and the regulations interpreting the statute at 28 C.F.R. §68.51 (now 28 C.F.R. §68.53). Because of the Ninth Circuit's holding in A-Plus Roofing, I concurred with an unopposed motion by the Immigration and Naturalization Service² to remand the appeal in the present case to the Office of the Chief Administrative Hearing Officer (hereinafter OCAHO). By order dated July 12, 1991, the Eleventh Circuit remanded the case to OCAHO and dismissed the appeal.

Under the Ninth Circuit decision in A-Plus Roofing, the respondent in the instant case would have filed its application for attorney's fees within the 30 day period required by EAJA. I submit that the A-Plus Roofing decision is now the controlling law. Accordingly, the presiding ALJ should rule on the merits of respondent's EAJA application of May 14, 1990.

ACCORDINGLY,

Pursuant to 28 C.F.R. §68.53(c), the Chief Administrative Hearing Officer hereby remands the Administrative Law Judge's Decision and Order of November 20, 1990.

Remanded this 12th day of December, 1991.

JACK E. PERKINS
Chief Administrative Hearing Officer

² The Immigration and Naturalization Service is represented in the United States Courts of Appeals by the Department of Justice's Office of Immigration Litigation.